



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: June 6, 2023

CBCA 7682

BRANDON STAFFING SOLUTIONS LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Richard J. Harris, Chief Executive Officer of Brandon Staffing Solutions LLC, Rockwall, TX, appearing for Appellant.

Natica Chapman Neely, Office of General Counsel, Department of Veterans Affairs, Jackson, MS, counsel for Respondent.

Before Board Judges **KULLBERG**, **SULLIVAN**, and **O'ROURKE**.

KULLBERG, Board Judge.

The Board ordered appellant, Brandon Staffing Solutions LLC (BSSL), to show cause why this appeal should not be dismissed for lack of jurisdiction. Respondent, the Department of Veterans Affairs (VA), contends that the appeal is either untimely or barred by the doctrine of res judicata. BSSL's representative has alleged health issues as the explanation for untimely filings or failure to respond to Board orders. For the reasons stated below, the appeal is dismissed.

Background

On November 12, 2019, the VA contracting officer (CO) issued a final decision (COFD) demanding that BSSL pay the Government the amount of \$85,513.64. The COFD concerned contract number VA241-17-P-00855 (contract), which was “a Non-Personal Firm Fixed Price Purchase Order for payroll coverage of the [compensated work therapy (CWT)] Program at the Bedford, Massachusetts, [VA medical center (VAMC)].” The COFD noted that BSSL owed “\$9,071 in bounced checks (‘return to maker’); \$3,716.65 in checks that were not cashed; and \$72,725.99, that they retained for a total owed of **\$85,513.64.**” (Emphasis in original).

On November 18, 2020, the CO issued a second COFD, which stated that the amount previously demanded in connection with the contract “was short \$26,154.10.” The VA’s second COFD demanded that BSSL pay the amount of \$111,667.74. By letter dated February 8, 2021, BSSL filed its notice of appeal of the November 18, 2020, COFD. On February 11, 2021, the Board docketed BSSL’s appeal, CBCA 7044. BSSL, however, repeatedly failed to respond to the Board’s orders, and on February 8, 2022, the Board dismissed the appeal for failure to prosecute. *Brandon Staffing Solutions LLC v. Department of Veterans Affairs*, CBCA 7044, 22-1 BCA ¶ 38,050, at 184,765.

On February 23, 2023, appellant filed its appeal of the November 12, 2019, COFD, but its notice of appeal stated that the amount in dispute was \$111,667.74, which was the amount demanded in the November 18, 2020, COFD. BSSL’s notice of appeal also referenced the dismissal of its previous appeal, CBCA 7044, for failure to prosecute and requested that it be “returned to the docket.” The Board raised, *sua sponte*, the issue of whether it had jurisdiction to hear the appeal given the previous dismissal of CBCA 7044. The Board’s March 13, 2023, order directed the parties to address the issue of jurisdiction. Both parties submitted responses.

The VA contends that the Board’s previous dismissal of BSSL’s appeal for failure to prosecute was a final judgment on the merits, and the Board’s dismissal precluded appellant from bringing an appeal of the same COFD under the doctrine of res judicata. Additionally, the VA argued that BSSL’s appeal of the November 12, 2019, COFD was untimely because BSSL filed its appeal more than ninety days after receipt. Appellant’s response made various representations about its representative’s ill health. The Board then issued an order to appellant to show cause why this appeal should not be dismissed. BSSL reiterated its previous inability to pursue its appeal for health reasons.

Discussion

At issue is whether the Board has jurisdiction to hear this appeal under either of the grounds, *res judicata* or timeliness, which have been asserted by the Government. The Board's jurisdiction to hear this appeal is pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2018). The Board addresses, in turn, the VA's grounds for dismissal.

The Board dismissed BSSL's previous appeal of the November 18, 2020, COFD for failure to prosecute. The doctrine of *res judicata* "involves the related concepts of claim preclusion and issue preclusion." *Phillips/May Corp. v. United States*, 524 F.3d 1264, 1267 (Fed. Cir. 2008). "The doctrine is properly applied to the final judgment of an administrative agency, such as a board of contract appeals, that 'is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.'" *Id.* (quoting *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966)). The Board has stated the following:

In general, "[a] dismissal with prejudice is a judgment on the merits for purposes of claim preclusion." *SBBI, Inc. v. International Boundary & Water Commission*, CBCA 4994, 17-1 BCA ¶ 36,722, at 178,816 (quoting *Pactiv Corp. v. Dow Chemical Co.*, 449 F.3d 1227, 1230 (Fed. Cir. 2006)). "The doctrine of claim preclusion operates by virtue of a final judgment, whether the judgment results by default, consent, dismissal with prejudice, or otherwise." *Id.* (quoting *Telcom Systems Services, Inc. v. Department of Health & Human Services*, GSBCA 12488-P, 94-1 BCA ¶ 26,272, at 130,703 (1993)).

U.S. Army Tactical Supply v. Department of State, CBCA 7376, 22-1 BCA 38,170, at 185,376. "A dismissal for failure to prosecute operates as an adjudication on the merits, unless stated otherwise." *Summit Commerce Pointe, LLC v. General Services Administration*, CBCA 2652-R, et al., 14-1 BCA ¶ 35,581, at 174,360 (citing Fed. R. Civ. P. 41(b)). The Board's dismissal of BSSL's previous appeal for failure to prosecute was an adjudication on the merits. Nothing in the Board's decision stated otherwise, and the Board deems the adjudication of the November 18, 2020, COFD to be final.

BSSL has alleged ill health of its representative and lack of knowledge as its reasons for not communicating with the Board, but it has not reasonably explained or shown why it waited almost one year to communicate with the Board after the dismissal of its previous appeal for failure to prosecute. Any party that appears before this Board has an obligation to comply with its orders, and the Board cannot be expected to "expend . . . its resources and time, attempting to track down an appellant which does not keep the Board informed as to

the status and location of its business.” *Mac-In-Erny, Inc.*, ASBCA 28689, 88-1 BCA ¶ 20,359, at 102,950 (1987), *aff’d*, 852 F.2d 321 (Fed. Cir. 1988) (appellant sought reconsideration nine months after dismissal of its appeal for failure to prosecute). BSSL offers no grounds for the Board to hear a new appeal of a claim that the Board previously adjudicated through a dismissal for failure to prosecute.

In its notice of appeal, BSSL also suggested its intent to appeal the VA’s November 12, 2019, COFD, but the Board has no jurisdiction to hear such an appeal. “The CDA, under which the Board reviews CO decisions, requires that an appeal of such a decision be filed ‘[w]ithin ninety days from the date of receipt of [the] decision.’” *Treasure Valley Forest Products v. Department of Agriculture*, CBCA 3604, 14-1 BCA ¶ 35,549, at 174,206 (quoting 41 U.S.C. § 7104(a)). “The ninety-day deadline is thus part of a statute waiving sovereign immunity, which must be strictly construed.” *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982). BSSL attempts to appeal a COFD far past the expiration of the ninety day period allowed by statute. The Board has no jurisdiction to hear an appeal of the November 12, 2019, COFD.

BSSL’s attempt to use ill health as an excuse for an untimely filing of its appeal is of no avail. The Board has no basis for tolling the ninety-day period for bringing an appeal. *See Coburn Contractors, LLC v. Department of Veterans Affairs*, CBCA 5033, 15-1 BCA ¶ 36,177, at 176,523. At most, BSSL has offered assertions of its representative’s health concerns, but such assertions do not justify BSSL’s failure to bring a timely appeal of the November 12, 2019, COFD.

Decision

The appeal is **DISMISSED FOR LACK OF JURISDICTION**.

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge

We concur:

Marian E. Sullivan

MARIAN E. SULLIVAN
Board Judge

Kathleen J. O’Rourke

KATHLEEN J. O’ROURKE
Board Judge